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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1949.

No. 264

HOMER M. PRESTON,

Respondent,

vs.

AETNA LIFE INSURANCE COMPANY,

Petitioner.

PETITIONER'S REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

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INDEX

PAGE

Argument

1. Essential medical facts undisputed 1
2. Summary judgment appropriate on opinion evidence if no disagreement 2
3. Proximate cause theory is relied on by Court of Appeals and respondent 3
4. Denial of leave to appeal adds nothing to *Rebenstorf* decision 4
5. Rewriting insurance contract 4

Conclusion 5

AUTHORITIES CITED.

Crandall v. Continental Casualty Co., 179 Ill. App. 330 3

Graham v. White-Phillips Co., 296 U. S. 27, 56 S. Ct. 21 4

Marks v. Pope, 289 Ill. App. 558 4

People v. Grant, 283 Ill. 391 4

People v. Harvey, 286 Ill. 593 2

Rebenstorf v. Metropolitan Life Insurance Co., 299 Ill. App. xvii 4

Sartor v. Kansas Natural Gas Corporation, 321 U. S. 620, 64 S. Ct. 724 2

Scanlan v. Metropolitan Life Insurance Co., 93 F. (2d) 942 3

Soden v. Clancy, 269 Ill. 98 4

Smith-Hurd Ill. Anno. Stat. Ch. 110, Secs. 198, 199 4

Ill. Rev. Stat. 1933 Ch. 110, Sec. 120 4

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We feel compelled to make the following few comments regarding the points raised in respondent's brief in opposition to our petition for a writ of certiorari:

1. Essential medical facts undisputed.

Respondent has misconstrued our statement of facts by pointing to minor and immaterial differences in the various medical affidavits introduced in the trial court by the plaintiff and by the defendant.

There is no dispute regarding the following, which are all the essential and material medical facts in this case:

(a) At the time of the accident the insured was suffering from some kind of a disease of the circulatory system in his right foot and leg (R. 32, 81, 85).

(b) As a medical fact, the pre-existing disease and the accidental blow combined to cause the loss of the insured's right leg (R. 32, 81, 85). In other words, the loss would not have happened but for the accident, *and* it also would not have happened but for the pre-existing disease.

2. Summary judgment appropriate on opinion evidence if no disagreement.

Under such circumstances a summary judgment based on opinion evidence is entirely appropriate. The agreed expert opinion would be binding on a jury if the questions were presented to a jury because as a matter of law no "common knowledge and experience" of the members of the jury could be relied on to contradict the agreed opinion of medical experts on a *technical* medical question.

The summary judgment question is of course a federal question, and is not controlled by Illinois law as respondent assumes (Br. 5). However, it is of interest to note that under Illinois law, as shown by the very quotation from *People* v. *Harvey,* 286 Ill. 593, 604, set forth at page 5 of respondent's brief, when the "common knowledge and experience of mankind" upon which every jury verdict is based fails because of the facts and circumstances of the question involved, then expert opinion of necessity becomes controlling on a *technical* question.

The *dictum* cited by respondent from the *Sartor* case does not aid him, for, as stated by Justice Jackson (321 U. S. 620, 624; 64 S. Ct. 724, 727), there the opinion evidence could not be given conclusive effect because it was contradicted by other testimony. In the case at bar, there is no evidence whatsoever to contradict the opinion evidence of the experts of both parties on the two essential medical questions above noted.

Further, the Court of Appeals did not hold, as is asserted by respondent, that summary judgment could not be based on undisputed opinion evidence, for the opinion in two places states that if the *Crandall* rule contended for by petitioner is adopted the summary judgment is proper (R. 116, 118).

3. Proximate cause theory is relied on by Court of Appeals and respondent.

It is significant to note that although respondent nowhere in his brief states that he is resting his case on the theory of proximate cause, still throughout his brief he repeatedly poses the issue presented by this case in the terms of what *single* factor caused the loss of insured's leg (Br. 2, 3). This is in actual fact an attempt to apply the proximate cause doctrine.

Respondent also contends (Br. 9) that petitioner and not the Court of Appeals has advanced the theory of proximate cause. This is not correct. The Court of Appeals adopted the rule announced in the *Scanlan* case (R. 118) and stated that rule to be that the evidence there was sufficient to support the verdict of the jury "that the injury was the *proximate* and sole cause of death" (R. 116; emphasis supplied). Indeed, under the undisputed facts of this case the order of the Court of Appeals remanding this case for trial on the merits leaves open for determination by a jury only the one question as to what was the proximate cause of the loss.

The undisputed medical facts here show that the loss of the leg was not due to the *single* factor of accidental injury but to a *combination of two causes*—the pre-existing disease and the injury. As we have contended in our original brief, the theory of proximate cause is entirely inapplicable in such a case. We believe it is significant

that respondent in his brief now attempts to disassociate himself from that theory, for by so doing he admits that proximate cause is not applicable under Illinois law. Eliminating proximate cause, what issue remains for trial?

4. Denial of leave to appeal adds nothing to Rebenstorf decision.

Respondent infers (Br. 3, 8) without citation of authority that the denial by the Illinois Supreme Court of a petition for leave to appeal the Appellate Court's decision in the *Rebenstorf* case (299 Ill. App. xvii) adds such weight to that decision as to make it determinative of the Illinois law. This is not correct. Under the Practice Act of 1907 as amended, denial of *certiorari* by the Supreme Court of Illinois did not make the opinion of the intermediate appellate court binding in other cases. *Graham* v. *White-Phillips Co.,* 296 U. S. 27, 56 S. Ct. 21 (1935); *People* v. *Grant,* 283 Ill. 391 (1918); *Soden* v. *Clancy,* 269 Ill. 98 (1915); *Marks* v. *Pope,* 289 Ill. App. 558, 565 (1937). The weight to be given to the Supreme Court of Illinois' denial of a petition for leave to appeal under the Civil Practice Act of 1933 is the same as that formerly given to denial of *certiorari* under Section 121 of the Practice Act of 1907 as amended. Ill. Rev. Stat. 1933, Ch. 110, Sec. 120; Smith Hurd Ill. Anno. Stat. Ch. 110, Sec. 198, 199.

5. Rewriting insurance contract.

Respondent's assumption (Br. 3, 8) that petitioner's position in this case is that anyone who recovers under an accident policy containing the exclusion provisions here present must be a "perfect physical specimen" is particularly inept. The exclusion clauses of the insurance contract contain no such requirement. A bodily condition not constituting a disease, or a disease not contributing to a

loss would not prevent recovery. The contracting parties have a right to agree that a loss contributed to by a disease will not be covered and there is no reason for treating such an exclusion in any different light than other exclusions contained in the contract prohibiting recovery for losses growing out of hernia, suicide, war, aviation, etc. (R. 10), all of which exclusions have repeatedly been sustained by the courts.

CONCLUSION.

We believe other points raised by respondent have been covered adequately in our original brief. Again, we respectfully request that a writ of certiorari be granted because of the important federal questions involved.

Respectfully submitted,

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